Supreme Court, U.S.
FILED

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

PIERRE JOLIGARD - PETITIONER

V.

WILLIAM E. FINDLER & CHRISTINA JOLIGARD - RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioning Party:

Pierre Joligard, Pro Se

6207 Williamsburg Boulevard

Arlington, Virginia 22207

(703) 237-5936

49 pp

QUESTIONS(S) PRESENTED:

1. IS A GUARDIAN AD LITEM ENTITLED TO NONDISCHARGEABILITY OF A COURT-ORDERED DEBT UNDER 11 U.S.C. SECTION 523(a)(5)?

2. IS A FORMER SPOUSE ENTITLED TO NONDISCHARGEABILITY OF A COURT ORDERED DEBT UNDER 11 U.S.C. SECTION 523(a)(5) IF THE NONDISCHARGE WOULD NOT HAVE THE EFFECT OF PROVIDING THE SUPPORT NECESSARY TO ENSURE THAT THE DAILY NEEDS OF THE CHILD ARE SATISFIED?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgement is the subject of this petition is as follows:

William Findler
2111 Wilson Boulevard, Suite 550
Arlington, Virginia 22201

Christina Joligard
205 David Drive, Apartment A-1
Bryn Mawr, Pennsylvania 19010

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STATUTES AND RULES
11 U.S.C. 523(a)(5)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below:

OPINIONS BELOW:

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is unpublished.

The opinion of the United States bankruptcy court appears at Appendix C to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was July 31, 1997.

No petition for rehearing was timely filed in my case.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Bankruptcy Code, 11 U.S.C. 523(a)(5)

STATEMENT OF THE CASE

This Petition brings a bankruptcy case to this Court's attention. This case actually consists of two adversary proceedings. The first proceeding involves William Findler, the former Guardian ad Litem of the Petitioner's minor child, seeking non-dischargeability of a state court-ordered debt payable directly to him. The second proceeding involves the Petitioner's former spouse seeking nondischargeability of a state court-ordered debt regarding certain legal expenses payable directly to the former spouse.

This Petitioner's position in the first proceeding is that the debt allegedly owed to William Findler must be discharged as a result of the Discharge of the Debtor Order issued by the United States Bankruptcy Court of the Eastern District of Virginia on August 19, 1995. This Petitioner asserts that William Findler is neither a former spouse or child of the Petitioner and is therefore ineligible nor entitled for the relief he seeks under 11 U.S.C. section 523.

a. This Court referred in Grogan v. Garner (498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991)) to "Congressional intent" in interpreting the narrow exceptions outlined in Section 523. At page 660 this Court specifically relied on language in the Senate Report to interpret the intent of the Congress.

b. Petitioner believes that the terms of the statute are unambiguous as he has already argued previously to the lower Courts hearing this case. Therefore this Petitioner believes that this Court's judicial inquiry is thus complete. Further, this is not a case where "rare and exceptional circumstances" exist (Rubin v. United States, 449 U.S. 424, 101 S. Ct. 698, 66 L. Ed. 2d. 633 (1981) and Crooks v. Harrelson, 282 U.S. 55, 51 S.Ct. 49, 75 L. Ed. 156 (1930)). As this Court in Rubin said, "it is not within the province of the court to modify the law by construction," because in the instant case this Petitioner's position regarding the plain meaning of Section 523(a)(5) is not an "absurdity" and not "so gross as to shock the general moral or common sense." This Court reiterated, with regard to the Bankruptcy Code, that "[w]here the statutory language is clear, the [courts'] sole

function...is to enforce it according to its terms" (Rake v. Wade, 508 U.S. 464, 113 S.Ct. 2187, 2191, 124 L. Ed. 2d. 424 (1993)) (quotations omitted)(brackeded areas added for clarity).

c. Further, the "long and unsatisfactory experience with a countertextual interpretation is one of the prime reasons for adhering to what Congress enacted." (Crandon v. United States, 494 U.S. 152, 110 S.Ct. 997, 108 L. Ed. 2d. 132 (1990)) (parallel type of case involving plainly interpreting a federal law)).

d. Given the clarity of the statutory text, Mr. Findler, the former Guardian ad Litem, bears "an exceptionally heavy" burden of persuading this Court that Congress intended to expand the definition of "a spouse, former spouse, or child of the debtor" to include a Guardian ad Litem (Patterson v. Shumate, 504 U.S. 753, 112 S.Ct. 2242, 2248, 119 L. Ed. 2d. 519 (1992)).

This Petitioner's position in the second proceeding is that the debt allegedly owed to Christina Joligard as a result of the state court decree was not necessary for her "economic

welfare" to enable her to "properly care for" herself or the minor child of the parties and that the obligation was not "actually in the nature of support." (Tavella v. Edwards, 151 B.R. 19, 22 (1993)). This Petitioner has repeatedly asserted that the nondischargeability of these debts does not have the effect "of providing the support necessary to ensure that the daily needs of the former spouse and any children of the marriage are satisfied." (In Re Calhoun, 715 F.2d 1103, 1109 (1993)). Nowhere in this case has the Petitioner's former spouse asserted that she could not "maintain the daily necessities, such as food, housing and transportation." Further, the original hearing which was at least in part forming the basis for the state court's order was almost exclusively focused on the matter of medical treatment of the parties' minor child, and not a proceeding to enforce a judgement for support or maintenance. The exceptions listed in section 523 "should be construed narrowly to assure the debtor has the opportunity for a fresh start." (Gleason v. Thaw, 236 U.S. 558, 562, 35 S.Ct. 287, 289, 59 L.Ed. 717 (1915)).

This Court can well see the varying and unsatisfactory interpretations other Federal Courts have made of this matter to whom, and what, constitutes support, alimony and maintenance under Section 523(a)(5). This Court has the opportunity in this case to settle this particular question of interpretation of Section 523(a)(5) for the entire Federal judiciary.

REASONS FOR GRANTING THE PETITION

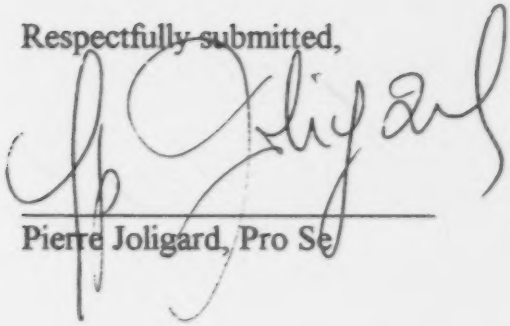
There has been a divergence of opinion on the proper interpretation of 11 U.S. C. section 523(a)(5) among the Federal courts.

Countless man days and effort can be saved for this country as a whole if this issue was argued and decided upon by this Honorable Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Pierre Joligard, Pro Se

Date: March 26, 1998

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2719

In Re: PIERRE JOLIGARD, a/k/a Georges Pierre Joligard,

Debtor.

WILLIAM E. FINDLER; CHRISTINA M. JOLIGARD,

Plaintiffs - Appellees,

PIERRE JOLIGARD, a/k/a Georges Pierre Joligard,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge. (CA-96-1281, BK-95-13940, AP-95-1484, AP-95-1506)

Submitted: July 24, 1997 Decided: July 31, 1997

Before HAMILTON, LUTTIG, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Pierre Joligard, Appellant Pro Se. William E. Findler, Christina M. Joligard, Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Appellant appeals the district court's order affirming the bankruptcy court's determination that amounts due to Appellant's ex-wife and the guardian ad litem appointed to represent their child's interests were not dischargeable in bankruptcy. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. Findler v. Joliqard, Nos. CA-96-1281, BK-95-13940, AP-95-1484, AP-95-1506 (E.D. Va. Nov. 12, 1996). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

NOV-8 1996

PIERRE JOLIGARD,	)	
	)	
Appellant	)	
	)	
v.	)	Civil Action No. 96-1281-A
	)	
WILLIAM E. FINDLER, et al.	)	
	)	
	)	
Appellees.	)	

ORDER

For the reasons stated in the accompanying Memorandum Opinion, the orders of the bankruptcy court are AFFIRMED.

The Clerk is directed to forward copies of this Order to the appellant and appellees pro se.

Entered this 8th day of November, 1996.

s/ Leonie M Brinkema
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

NOV' - 8 1996

PIERRE JOLIGARD,	)	
	)	
Appellant	)	
	)	
v.	)	Civil Action No. 96-1281-A
	)	
WILLIAM E. FINDLER, et al.	)	
	)	
	)	
Appellees.	)	

MEMORANDUM OPINION

Pierre Joligard pro se appeals two orders of the bankruptcy court in Case No. 95-13940-AM and Adversary Proceeding No. 95-1484. The orders determined that certain debts appellant had been ordered to pay by a state court were nondischargeable in bankruptcy. Because the Court agrees that the debts were nondischargeable, the Court affirms the bankruptcy court in all respects.

Appellant Pierre Joligard and appellee Christina Joligard pro se were divorced on October 8, 1993, by a final divorce decree entered by the Circuit Court of Arlington County. In a separate proceeding, the circuit court awarded sole custody of their minor child, Mischa, to Christina Joligard. Joligard v. Joligard, No. A10173-01-A. The court ordered Pierre Joligard to make child support payments, as well as to pay Christina Joligard $2,319 for Mischa's medical expenses, $6,925 for attorneys fees, and $794.10

for court reporting costs. Finally, the court ordered Pierre Joligard to pay Mischa's guardian ad litem, William Findler, $4,200.

On September 7, 1995, Pierre Joligard filed a chapter 7 bankruptcy petition. On December 11, 1995, Christina Joligard sought a determination that the obligations in the state court order are nondischargeable. Treating her complaint as a motion for summary judgment, the court found that the debts are nondischargeable. William Findler filed a separate complaint seeking an order that the guardian ad litem fees are nondischargeable. Again, the bankruptcy court found the debt nondischargeable. Pierre Joligard was a granted a discharge in bankruptcy on December 14, 1995, however, he appeals the bankruptcy court's determinations that the medical expenses, attorneys fees, court reporting fees, and guardian ad litem fees are nondischargeable.

In considering an appeal from an order of a bankruptcy court, this Court sits as an appellate court. Fed. R. Bankr. P. 8013. It cannot set aside findings of fact unless clearly erroneous. Although the purpose of bankruptcy is to provide debtors with a fresh start, under the Bankruptcy Code, certain obligations are nondischargeable because of "an overriding public policy favoring the enforcement of familial obligations." Robb-Fulton v. Robb, 23 F.3d 895 (4th Cir. 1994). Specifically, Section 727 prohibits a discharge for

> the individual debtor from any debt . . . [t]o a spouse, former spouse, or child of the debtor for alimony to, maintenance for, or support of such spouse or child in connection with the separation agreement, divorce decree or other order of a court of record.

11 U.S.C. ß 523(a)(5).

This Court concludes that the bankruptcy court correctly found that the mother's attorneys fees, the medical expenses, the

court reporting costs and the guardian ad litem fees all fall within this exception and are, therefore, nondischargeable.

At the state court custody hearing, and on appeal, Pierre Joligard alleges that the medical expenses are not necessary for the support of Mischa, and that the administration of certain drugs to Mischa actually harmed him. After hearing testimony from the parties and doctors, the state judge, however, disagreed with that position and awarded the mother medical expenses, concluding that Pierre Joligard "does not accept the magnitude of Mischa Joligard's medical and emotional problems, although the preponderance of the evidence shows that the child is in distress and in need of medical attention," and that Pierre "has failed to cooperate in the therapy of the minor Mischa Joligard." Whether the medical expenses were proper has been fully litigated between these parties, and the principles of collateral estoppel precluded the bankruptcy court, and preclude this Court, from revisiting that issue.

The legal argument that proper medical expenses for a child are dischargeable is untenable. As Judge Mitchell noted, "it is difficult to imagine how a court order for their payment would not be in the nature of a support obligation" (emphasis in original).

The bankruptcy court was also correct in finding that attorneys fees and court reporting costs were nondischargeable because it is well-established in the case law that attorneys fees and court costs in divorce or custody cases fall within the discharge exception. In re Silansky, 897 F.2d 743 (4th Cir. 1990); In re Roberson, 187 B.R. 159 (Bankr. E.D. Va. 1995). Just as the medical expenses have been fully litigated, the propriety of the attorney fee award was determined in the state court and properly accepted by the bankruptcy court.

Finally, as to the guardian ad litem fees, the state court appointed Findler as guardian ad litem for the protection of Mischa; the payment of his fees is therefore an appropriate aspect of the child's support and is not dischargeable. In re Laing, 187 B.R. 531

(Bankr. W.D. Va. 1995). See also Miller v. Gentry, 55 F.3d 1487, 1489 (10th Cir. 1995).

For these reasons, the orders of the bankruptcy court are AFFIRMED.

The Clerk is directed to forward copies of this Memorandum Opinion to the appellant and appellees pro se.

Entered this 8th day of November, 1996.

s/Leonie M. Brinkema
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:	)	
	)	
PIERRE JOLIGARD a/k/a	)	Case No. 95-13940-AM
GEORGES PIERRE JOLIGARD	)	Chapter 7
	)	
Debtor	)	*Alexandria Division*
	)	*Filed Jul 16 1996*
CHRISTINA JOLIGARD	)	*Clerk U.S. Bankruptcy Court*
	)	
Plaintiff	)	
	)	
v.	)	Adversary Proceeding
	)	No. 95-1506
PIERRE JOLIGARD	)	
	)	
Defendant	)	

ORDER

At a pretrial conference held in open court on June 18, 1996, the court heard argument on the motion for summary judgment filed by the plaintiff on May 29, 1996, and took the matter under advisement.

Upon consideration of the pleadings, memoranda, affidavits, and exhibits, and for the reasons stated in the memorandum opinion filed with this order, it is

ORDERED:

1. The motion for summary judgment is denied insofar as the plaintiff seeks a determination of nondischargeability under 11 U.S.C. § 523(a)(15).

2. The motion for summary judgment is denied insofar as it seeks a determination that fees owed William Findler as guardian ad litem are nondischargeable.

3. The motion for summary judgment is granted insofar as the plaintiff seeks a determination of nondischargeability under 11 U.S.C. § 523(a)(5).

4. The debtor's obligations under the final order of the Circuit Court of Arlington County, Virginia, dated April 14, 1995, in the matter of Christina M. Joligard v. Pierre Joligard, Chancery No. 94-594 to pay the plaintiff $2,319.00 as medical expenses for Mischa Joligard, $6,925.00 toward her attorneys fees, and $794.10 toward court reporting expenses incurred in that proceeding are determined to be excepted from discharge under 11 U.S.C. § 523(a)(5) as being in the nature of a support obligation to Mischa Joligard.

5. The clerk will mail a copy of this order, together with a copy of the court's memorandum opinion, to the plaintiff and to the defendant.

Date: /July 16, 1996
Alexandria, Virginia

s/Stephen S. Mitchel
Stephen S. Mitchell
United States Bankruptcy Judge

Copies to:

Ms. Christina Joligard
1407 Stocton Road
Meadowbrook, PA 19006
Plaintiff *pro se*

Mr. Pierre Joligard
6207 Williamsburg Blvd
Arlington, Va 22207
Defendant *pro se*

NOTICE OF JUDGMENT
OR ORDER
Entered On Docket 11/16/96

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:	)	
	)	
PIERRE JOLIGARD a/k/a	)	Case No. 95-13940-AM
GEORGES PIERRE JOLIGARD	)	Chapter 7
	)	
Debtor	)	*Alexandria Division*
	)	*Filed Jul 16 1996*
CHRISTINA JOLIGARD	)	*Clerk U.S. Bankruptcy Court*
	)	
Plaintiff	)	
	)	
v.	)	Adversary Proceeding
	)	No. 95-1506
PIERRE JOLIGARD	)	
	)	
Defendant	)	

MEMORANDUM OPINION

This matter is before the court on a motion for summary judgment filed by the plaintiff. A hearing was held on June 18, 1996, at which the plaintiff heard the arguments of the parties, both of whom are proceeding pro se in this litigation. At the conclusion of the hearing, the court took the matter under advisement and is now prepared to rule. For the reasons set forth in this opinion, the court concludes that the plaintiff is entitled to summary judgment determining that certain obligations arising under a state court child custody and support order are nondischargeable.

Facts

Certain of the facts are undisputed; others are hotly controverted. The undisputed facts may be briefly stated. The plaintiff and the debtor were divorced on October 8, 1993 by a final decree of divorce entered by the Circuit Court of Arlington County, Virginia. Among other provisions, that decree awarded the parties joint custody of their minor child, Mischa B. Joligard. The decree concluded by referring "all further matters" in the

"proceedings" to the Arlington County Juvenile and Domestic Relations Court. The plaintiff subsequently brought an action in the Juvenile and Domestic Relations Court of Arlington County, seeking a change of custody. That court granted sole custody to the plaintiff and ordered the debtor to pay child support to the plaintiff and well as to share the cost of certain medical expenses. The debtor took an appeal to the Circuit Court of Arlington County, which heard the matter *de novo.* That court, after three days of hearing in January 1995, entered a final order dated April 14, 1995, nunc pro tunc to January 25, 1995. That order found that the debtor "does not accept the magnitude of Mischa Joligard's medical and emotional problems, although the preponderance of the evidence shows that the child is in distress and in need of medical attention" and that the debtor "has failed to cooperate in the therapy of the minor Mischa Joligard." The decree granted the plaintiff sole custody of Mischa and, relevant to the present controversy, ordered the debtor to make the following payments:

> 1. Child support payments to the plaintiff of $175 per week beginning January 25, 1995.
>
> 2. A payment to the plaintiff by April 25, 1995, of $2,319, plus interest at the statutory rate of 9% from May 14, 1994 "toward Mischa's medical expenses."[1]
>
> 3. Child support arrearages to the plaintiff in the amount of $2,037.50 by April 25, 1995.
>
> 4. A payment to the plaintiff by April 25, 1995, of $6,925 "toward her attorney's fees." The decree recites that this sum "includes the costs of the trial.

[1] The Circuit Court order provides no further information concerning how this sum was calculated. However, the July 13, 1994 order of the Juvenile and Domestic Relations Court provides the following explanation: "This sum represents Respondent's [i.e., the debtor's] one-half share of the medical bills owed to Dr. Ronald D. Matthews for psychological evaluations, Respondent's one-half share of the medical bills owed to Dr. Elizabeth Finch and other medical/dental professionals through April 30, 1994, as well as one-half the fee charged by Dr. Matthews to attend and give testimony in these proceedings. " Joligard v. Joligard, No. A-1017301-A, Order, p. 10.

5. A payment to the plaintiff by April 25, 1995, of $794.10 "toward the costs of Court reporting incurred in this matter."[2]

6. A payment to William Findler, Esquire, Mischa's guardian ad litem, of $4,200 by April 25, 1995.[3]

On September 7, 1995, the debtor filed a voluntary petition in this court under chapter 7 of the Bankruptcy Code and was granted a discharge on December 14, 1995.[4] On December 11, 1995, the plaintiff filed the adversary complaint that is presently before the court seeking a determination that the obligations arising from the April 14, 1995, order are excepted from discharge under §§ 523(a)(5) and (a)(15), Bankruptcy Code. The debtor filed an answer and motion to dismiss,[5] as well as a "supplementary answer," and the parties are now at issue.

Those are the undisputed facts. The disputed facts are the

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[2] The court reporting firm, A. L. & F. Court Reporting, that took the proceedings in state court, is also the official reporter for this court. In ruling on the present motion for summary judgment, this court has not considered or relied on any transcript prepared by A. L. & F.

[3] These fees are the subject of a separate complaint to determine dischargeability (Adversary Proceeding No. 95-1484) filed by the guardian ad litem. The court concurs with the debtor that the plaintiff in the present adversary proceeding lacks standing to litigate the dischargeability of the guardian ad litem fees, since the order of the Circuit Court of Arlington County imposed no liability for such fees on Mrs. Joligard. In any event, a separate judgment has been entered in Adversary Proceeding No. 95-1484 determining that the fees owed to the guardian ad litem are nondischargeable, and those fees will not be further considered in the context of the present adversary proceeding.

[4] The debtor had filed a previous chapter 7 petition on May 2, 1995 (Case No. 95-11838), which was dismissed after he failed to appear at the meeting of creditors.

[5] The motion to dismiss—most of which would have required consideration of matters outside the four corners of the complaint—was never set for hearing. For the purposes of the present motion, the court treats it as a cross-motion for summary judgment.

correctness of the underlying dispute litigated in, and adjudicated by, the Arlington County Circuit Court. Specifically,the debtor and his former wife disagreed over the appropriateness of the medical care being provided to Mischa, and, in particular, the administration of psychotropic drugs to Mischa. The debtor strongly opposed, and continues to oppose, the use of such drugs. He asserts that the administration of such drugs constituted child abuse and was found to be improper by doctors at Fairfax Hospital. Additionally, the debtor asserts that the plaintiff is neglecting the child's medical needs by not having him treated for Silver-Russell Syndrome. Finally, the debtor asserts that the plaintiff's present financial circumstances are sufficiently comfortable that she does not need to be reimbursed for the medical expenses, attorney's fees and court reporter fees that she had already paid.

Conclusions of Law and Discussion

I.

This court has jurisdiction of this controversy under 28 U.S.C. §§ 1334 and 157(a) and the general order of reference entered by the United States District Court for the Eastern District of Virginia on August 14, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I). Venue is proper in this District under 28 U.S.C. § 1409(a).

II.

Under § 523, Bankruptcy Code, a chapter 7 discharge does not discharge an individual debtor from certain kinds of debts, among them the following:

> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that—
>
> (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act, or any such debt which has been assigned to

the Federal Government or to a State or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless—

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor[.]

The debtor does not dispute that the prospective child support payments of $175 per week and the arrearage of $2,037.50[6] are nondischargeable under § 523(a)(5), Bankruptcy Code. He vigorously disputes, however, that the attorney fees, medical expenses, and court reporter fees are in the nature of support.

[6] According to the plaintiff's motion for summary judgment, the debtor has paid this sum. There also appears to be no dispute that he is current on his weekly payments.

III.

A motion for summary judgment in an adversary proceeding is governed by Fed.R.Bankr.P. 9056, which incorporates Fed.R.Civ.P. 56. Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In ruling on a motion for summary judgment, a court should believe the evidence of the non-moving party, and all justifiable inferences must be drawn in his favor. *Anderson v. Liberty Lobby, Inc.*,477 U.S. 242, 255 (1986). Nevertheless, not just any factual dispute is sufficient to bar summary judgment; the dispute must be as to a "material" fact. *Id.* at 247-248.[7] Where, as here, it is the plaintiff that is moving for summary judgment, this means that the dispute must concern a fact which, if established, would defeat a required element of the moving party's case or constitute an affirmative defense.

A.

As an initial matter, the court notes that the plaintiff's complaint, to the extent it seeks relief under § 523(a)(15), appears to have been untimely filed. Under § 523(a), Bankruptcy Code, 16 categories of debts are made nondischargeable in a chapter 7 case. As to 12 of those categories—including § 523(a)(5) support debts—there is no time limit for filing a nondischargeability complaint, and the determination of nondischargeability may be made either by the Bankruptcy Court or by the court in which the claim is asserted. Fed.R.Bankr.P. 4007(b).[8] However, with respect to four of the categories—including § 523(a)(15) divorce or property settlement debts—only the Bankruptcy Court may make a determination of nondischargeability, and even then only if a

[7] "By its very terms, [Rule 56] provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted."

[8] "A complaint other than under § 523(c) may be filed at any time. "

complaint seeking such determination is filed within 60days of the first date set for the meeting of creditors under § 341, Bankruptcy Code. § 523(c), Bankruptcy Code;[9] Fed.R.Bankr.P. 4007(c).[10]

In the present case, the first date set for the meeting of creditors was October 5, 1995. Sixty days from that date was December 4, 1995. The plaintiffs complaint was filed on December 11, 1995, one week later. As noted above, under Fed.R.Bankr.P. 4007(c), the court may extend the deadline to file a dischargeability complaint only if the request for the extension is made "before the time has expired," and the deadline may not be extended after it has expired based on excusable neglect. *Shunck v. Santos (In re Santos)*, 112 B.R. 1001, 1008 (9th Cir. BAP, 1990) ("there is no discretion to enlarge the time periods [for filing complaints objecting to discharge or to determine dischargeability] on the basis of excusable neglect when the request is made after the time period as expired."); *Farouki v. Emirates Bank Int'l Ltd.* 14 F.3d 244, 249 (4th Cir. 1994) *(dicta,* citing *Santos).* Since the plaintiff's complaint was filed outside the 60-day period, and since the court is without discretion to enlarge the time in the absence of a request for that purpose made before the original deadline had expired, the court is without power to make a determination of nondischargeability under § 523(a)(15).

B.

Since there is no corresponding time bar under § 523(a)(5), however, it is necessary to consider whether the undisputed facts entitle the plaintiff to a determination that the attorney's fees, court reporting fees, and medical expenses constitute support—either for Mischa or the plaintiff—so as to

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[9] "... the debtor shall be discharged from a debt of the kind specified in paragraph (2), (4), (6), or (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge .... "

[10] "A complaint to determine the dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to § 341(a).... On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. *The motion shall be made before the time has expired."* (emphasis added).

be excepted from discharge. It is well settled in this Circuit that attorney fee awards and related litigation costs incurred in a proceeding to establish support may themselves constitute support within the meaning of § 523(a)(5). *Roberson v. Roberson (In re Roberson)*, 187 B.R. 159, 163 (Bankr. E.D. Va. 1995) (attorney fees); *Walker v. Laing (In re Laing)*, 187 B.R. 531 (Bankr. W.D. Va. 1995) (guardian ad litem fees and costs of psychological testing and evaluation of children in connection with custody proceeding); *Silansky v. Brodsky, Greenblatt & Renchan (In re Silansky)*, 897 F.2d 743 (4th Cir.1990) (attorney's fees); *Foiles v. Taylor*, 174 B.R. 692 (E.D.Va. 1994) (commissioner in chancery fees). The question of whether a particular debt is in the nature of support is largely a question of intent. *Beaton v. Zerbe (In re Zerbe)*, 161 B.R. 939, 941 (E.D.Va. 1994). In a case where a fact finder such as a judge makes the determination that one party must pay the other's attorney's fee, it is the intention of the finder of fact that controls. *Id.* The burden of proof is on the objecting party to prove that the debt is actually in the nature of support, and such proof must be by a preponderance of the evidence. *Roberson, supra*, at 163.

The April 14, 1995, order does not expressly characterize the obligations at issue here as being in the nature of support, and there has been no transcript filed of the state court proceedings.[11] The order does, however, reflect that the court made findings as to the earning capacity of both parents. [12] Additionally, the defendant has admitted, in response to requests for admission, that at the hearing the state court reviewed the income tax returns of the defendant from 1990 through 1994, and the plaintiff has filed an affidavit that the medical expenses addressed by the April 14, 1995, order included the usual medical care for Mischa, together with the cost of testing and examinations in preparation for the hearing, and that the attorney's fees the debtor was ordered to pay were

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[11] " *See, In re Grady*, 180 B.R. 461 (Bankr.E.D.Va. 1995), where Judge Adams of this court noted that, in determining the intent of the state court in awarding attorney's fees, "The Court may look to a variety of factors to ascertain the intent of the circuit court judge including pleadings, orders, transcripts, and the language of the divorce decree itself," citing *Bangert v. McCauley (In re McCauley)*, 105 B.R. 315, 319-320 (E.D.Va.1989).

[12] The court found that the debtor "earns or has the capacity to earn at least $40,000 annually" and that the plaintiff "earns $28,000 per year."

to reimburse the plaintiff for payments she actually made to her counsel in the support and custody hearing.

With respect to the medical expenses for Mischa, it is difficult to imagine how a court order for their payment would *not* be in the nature of a support obligation. Next to food and shelter, few needs are more basic or essential to a child's welfare than medical care. The debtor asserts, however, that whatever may be the general rule, he is prepared to prove that Mischa not only did not benefit from, but in fact was harmed by, the medical care, and thus the expenses incurred should not be considered "support." The issue of Mischa's medical treatment was the central controversy before the Circuit Court of Arlington County. The debtor vigorously participated in the three-day hearing before that court and was represented by counsel. Since the issue was actually litigated before a court having both subject-matter and in personam jurisdiction and was necessary to that court's ruling, settled principles of collateral estoppel prevent the debtor from relitigating in this court the merits of that controversy. If the findings of the Circuit Court of Arlington County were erroneous, they could have been appealed; but they cannot be collaterally attacked in the context of this nondischargeability proceeding.

The question of whether the attorney's fees and court reporter fees were intended to be in the nature of support presents a much closer case, particularly as the order is notably silent as to the state court's rationale for requiring the debtor to pay them. However, since the only matters being litigated at the hearing that resulted in the April 14, 1995, order were those directly involving the child's welfare—that is, custody, support, and visitation—it is a reasonable inference that the court had to have found that the litigation fees the plaintiff incurred were necessary to promote and protect the child's best interests. *See, Roberson, supra,* at 161 (where "child support issues occupied a significant portion of the ultimate divorce decree," the court determined as a matter of fact "that the awarded attorneys' fees and court costs are integrally connected with the award of child support").[13] The debtor has pointed to nothing—except his

[13] This court does not adopt a hard and fast rule that attorney's fees and litigation costs awarded to the prevailing party in a child support or child custody proceeding will always constitute support. *See, Foiles v. Taylor,* 174 B.R. 692, 696 (E.D.Va. 1994) (cautioning against per se rule). The fact that the fees were incurred in connection with such a proceeding, however, does

assertion that the state court reached the wrong result— tending to show that the attorney's fees and court reporting fees were incurred other than in an effort to advance the child's welfare. Consequently, the court concludes that the plaintiff has carried her burden of showing that there is no material disputed issue of fact related to the attorney's fees and court reporter fees that the Circuit Court of Arlington County ordered the debtor to pay, and that such fees are in the nature of child support.[14]

Accordingly, a separate order will be entered granting the motion for summary judgment and determining that the medical expenses, attorney's fees and court reporter fees that the debtor was ordered to pay are nondischargeable under § 523(a)(5), Bankruptcy Code. The motion for summary judgment will be denied to the extent it seeks a determination of nondischargeability under § 523(a)(15) or with respect to the guardian ad litem fees.

Date: /July 16, 1996
Alexandria, Virginia

s/Stephen S. Mitchel
Stephen S. Mitchell
United States Bankruptcy Judge

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13 (...continued)

reasonably give rise to an inference that the court's purpose in awarding them was to promote the child's welfare. Such an inference, in the absence of evidence or justifiable inferences to the contrary, may be sufficient to carry the day.

[14] The debtor's contention that his former wife is comfortably well off in a financial sense and thus does not need to be reimbursed would be relevant in the § 523(a)(15) context, since under that provision the court must balance the detriment to the debtor of not discharging the debt against the detriment to the nondebtor party of discharging the debt. Additionally, an analysis of the wife's financial situation would be appropriate if the issue were one of support for **her**. But here, the context of the state court's award adequately demonstrates that the payments were intended as support for **Mischa**.

Copies to:

Ms. Christina Joligard
1407 Stocton Road
Meadowbrook, PA 19006
Plaintiff *pro se*

Mr. Pierre Joligard
6207 Williamsburg Blvd
Arlington, Va 22207
Defendant *pro se*

NOTICE OF JUDGMENT
OR ORDER
Entered On Docket 11/16/96

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:	)	
	)	
PIERRE JOLIGARD a/k/a	)	Case No. 95-13940-AM
GEORGES PIERRE JOLIGARD	)	Chapter 7
	)	
Debtor	)	
	)	
WILLIAM E. FINDLER	)	
	)	
Plaintiff	)	
	)	
v.	)	Adversary Proceeding
	)	No. 95-1484
PIERRE JOLIGARD	)	
	)	
Defendant	)	

ORDER GRANTING SUMMARY JUDGMENT

This matter was heard in open court on July 9, 1996, on the motion for summary judgment filed by the plaintiff. No formal opposition was filed by the debtor, but the court treated the Answer and Motion for Dismissal of Complaint filed by the debtor as the equivalent of an opposition and as a cross-motion for summary judgment. Both the plaintiff and the debtor were present at the hearing.

Upon consideration of the pleadings, affidavit, memorandum, and the argument of the parties, and for the reasons stated orally on the record, and which have been reduced to a memorandum opinion filed with this order, it is

ORDERED:

1. The debtor-defendant's motion to dismiss is denied and the plaintiff's motion for summary judgment is granted.

2. Judgment is entered in favor of the plaintiff determining that the sums owed by the debtor to the plaintiff for the plaintiffts services as guardian ad litem for Mischa Joligard, as determined by the Circuit Court of Arlington County, Virginia, by Final Order dated April 15, 1995, entered in *Christina M. Joligard v. Pierre Joligard,* Chancery No. 94-594, is excepted from discharge under 11 U.S.C. § 523(a)(5).

3. The clerk shall mail a copy of this order, together with a copy of the court's memorandum opinion, to the plaintiff and to the defendant.

Date: /July 11, 1996
Alexandria, Virginia

s/Stephen S. Mitchell
Stephen S. Mitchell
United States Bankruptcy Judge

Copies to:

William E. Findler, Esquire
2111 Wilson Blvd., Ste 550
Arlington, Va 22201
Plaintiff pro se

Mr. Pierre Joligard
6207 Williamsburg Blvd
Arlington, Va 22207
Defendant *pro se*

NOTICE OF JUDGMENT
OR ORDER
Entered On Docket 07/16/96

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:	)	
	)	
PIERRE JOLIGARD a/k/a	)	Case No. 95-13940-AM
GEORGES PIERRE JOLIGARD	)	Chapter 7
	)	
Debtor	)	
	)	
WILLIAM E. FINDLER	)	
	)	
Plaintiff	)	
	)	
v.	)	Adversary Proceeding
	)	No. 95-1484
PIERRE JOLIGARD	)	
	)	
Defendant	)	

MEMORANDUM OPINION

This matter is before the court on a motion for summary judgment filed by the plaintiff, who has sought a determination that fees ordered paid to him as guardian ad litem for the debtor's minor son are nondischargeable.

Facts

Certain of the facts are undisputed; others are hotly controverted. The undisputed facts may be briefly stated. The debtor and his former wife, Christina Joligard, were divorced on October 8, 1993 by a final decree of divorce entered by the Circuit Court of Arlington County, Virginia. Among other provisions, that decree awarded the parties joint custody of their minor child, Mischa B. Joligard. The decree concluded by referring "all further matters" in the "proceedings" to the Arlington County Juvenile and Domestic Relations Court. Christina Joligard subsequently brought a motion in the Juvenile and Domestic Relations Court of Arlington County, seeking a change of custody. That court granted her sole custody of Mischa and ordered the debtor to pay her child support. The plaintiff here, William E.

Findler, a practicing attorney, was appointed as guardian ad litem for Mischa by the Juvenile and Domestic Relations Court. The debtor took an appeal to the Circuit Court of Arlington County, which heard the matter *de novo*. Mr. Findler continued to represent Mischa as guardian ad litem before the Circuit Court. The Circuit Court, after three days of hearing in January 1995, entered a final order dated April 14, 1995, nunc pro tunc to January 25, 1995 granting Christina Joligard sole custody of Mischa and, relevant to the present controversy, ordering the debtor to pay Mr. Findler $4,200 as guardian ad litem fees by April 25, 1995.

On September 7, 1995, the debtor filed a voluntary petition in this court under chapter 7 of the Bankruptcy Code.[1] On November 27, 1995, the plaintiff filed the complaint that is presently before the court seeking a determination that the guardian ad litem fees owed to him by the debtor as a result of the April 14, 1995, order were excepted from discharge under §§ 523(a)(5) Bankruptcy Code. The debtor filed an answer and motion to dismiss,[2] as well as a "supplementary answer," and the parties are now at issue.

Those are the undisputed facts. The disputed facts are the correctness of the underlying dispute litigated in, and adjudicated by, the Circuit Court of Arlington County. Specifically, the debtor and his former wife disagreed over the appropriateness of the medical care being provided to Mischa, and in particular the administration of psychotropic drugs to Mischa. The debtor strongly opposed, and continues to oppose, the use of such drugs. He asserts that the administration of such drugs constituted child abuse and was ultimately found to be improper by doctors at Fairfax Hospital. The debtor further asserts that Mr. Findler— presumably because he did not oppose the medical treatment advocated by the former wife— did not faithfully represent Mischa's interests in the state court litigation.

[1] He had previously filed a chapter 7 petition on May 2, 1995, (Case No. 95-11838), which was dismissed based on the debtor's failure to appear at the meeting of creditors.

[2] The motion to dismiss—most of which would have required consideration of matters outside the four corners of the complaint—was never set for hearing. For the purposes of the present motion, the court treats it as a cross-motion for summary judgment.

Conclusions of Law and Discussion

I.

This court has jurisdiction of this controversy under 28 U.S.C. §§ 1334 and 157(a) and the general order of reference entered by the United States District Court for the Eastern District of Virginia on August 14, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I). Venue is proper in this District under 28 U.S.C. § 1409(a).

II.

Under § 523, Bankruptcy Code, a chapter 7 discharge does not discharge an individual debtor from certain kinds of debts, among them the following:

> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that–
>
> (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or
>
> (B)such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

III.

A motion for summary judgment in an adversary proceeding is governed by Fed.R.Bankr.P. 7056, which incorporates Fed.R.Civ.P. 56. Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). In

ruling on a motion for summary judgment, a court should believe the evidence of the non-moving party, and all justifiable inferences must be drawn in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Nevertheless, not just any factual dispute is sufficient to bar summary judgment; the dispute must be as to a "material" fact. This means that the fact must be one which, if established, would defeat an required element of the moving party's case or constitute an affirmative defense.

Here, the debtor makes essentially two arguments. The first is that, as a pure matter of statutory construction, the guardian ad litem fees do not in literal terms constitute a debt "*to* a spouse, former spouse, or child of the debtor, for ... support of such ... child," since under the terms of the April 14, 1995 decree the debt is owed directly to Mr. Findler rather than to the child or his mother. This argument was considered and rejected in *Kellerman v. Laing (In re Laing)*, 187 B.R. 531 (Bankr. W.D.Va. 1995) (Krumm, C.J.), which this court finds persuasive. In particular, this court agrees "that it is not the identity of the payee that determines dischargeability but the nature of the debt owed," *id.* at 532-533, and that "in proceedings involving custody of children, the court ordered fees for services of a guardian ad litem ... are debts of the parents to their children for purposes of discharge under 11 U.S.C. § 523(a)(5) unless there is a clear finding of fact and ruling of law in the state court proceedings to the contrary." *Id.* at 533.

The debtor's second argument is that the services of the guardian ad litem not only did not benefit, but in fact harmed, the child, since the outcome of the state court action resulted in the continuation of an inappropriate course of medical treatment. There is no assertion or showing of any underlying impropriety in Mr. Findler's representation, such as actual malice or conflict of interest. The issue of Mischa's medical treatment was the central controversy before the Circuit Court of Arlington County. The debtor vigorously participated in the three-day hearing before that court and was represented by counsel. Since the issue was actually litigated before a court having both subject-matter and in personam. jurisdiction and was necessary to that court's ruling, principles of collateral estoppel prevent the debtor from relitigating in this court the merits of that controversy. *Grogan v. Garner*, 498 U.S. 279, 284-5, n.11 (1991) ("We now clarify that collateral estoppel principles do indeed apply in discharge exception proceedings pursuant to § 523(a)"). In this connection, this court makes no independent ruling on the underlying issue of whether Mischa's medical care was appropriate, or whether sole custody of Mischa should have been granted to the debtor's former wife, Christina Joligard. If the judgment of the

Circuit Court of Arlington County was erroneous, it could have been appealed; but it cannot be collaterally attacked in the context of this nondischargeability proceeding. Although it is true that this court is not bound in a nondischargeability proceeding by the labels a state court may use to characterize the debt being adjudicated and may look behind the judgment, this court is not free to ignore factual determinations involving the same parties made by a state court within the scope of its jurisdiction.

For the foregoing reasons, the court determines that the disputed issues involving the appropriateness of Mischa's medical care are not "material" under Fed.R.Civ.P. 56 because those issues may not be relitigated in this court. The order of the Arlington County Circuit Court is a final determination by a court of record acting within the scope of its jurisdiction. It is undisputed that fees were awarded to Mr. Findler for his services in representing the minor child of the debtor in matters intimately related to the child's welfare, namely the custody of the child and the amount that should be paid for his support. That the state court's decision was arguably wrong, as the debtor asserts, does not change the nature of the obligation. Accordingly, summary judgment will be entered in the plaintiff's favor determining that the $4,200 guardian ad litem fee is excepted from discharge under § 523(a)(5), Bankruptcy Code.

A separate order will be entered.

Date: /July 11, 1996
Alexandria, Virginia

s/Stephen S. Mitchell
Stephen S. Mitchell
United States Bankruptcy Judge

NOTICE OF JUDGMENT OR ORDER
Entered On Docket 07/11/96

Copies to:

William E. Findler, Esquire
2111 Wilson Blvd., Ste 550
Arlington, Va 22201
Plaintiff pro se

Mr. Pierre Joligard
6207 Williamsburg Blvd
Arlington, Va 22207
Defendant *pro se*

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:	)	
	)	
PIERRE JOLIGARD a/k/a	)	Case No. 95-13940-AM
GEORGES PIERRE JOLIGARD	)	Chapter 7
	)	
Debtor	)	
	)	
CHRISTINA JOLIGARD	)	
	)	
Plaintiff	)	
	)	
v.	)	Adversary Proceeding
	)	No. 95-1506
PIERRE JOLIGARD	)	
	)	
Defendant	)	

MEMORANDUM OPINION AND ORDER

Before the court is a letter from the plaintiff to the clerk dated August 6, 1996, and filed August 14, 1996, requesting that certain documents included in the defendant's designation of record on appeal be stricken, or, in the alternative, segregated from the rest of the record on appeal when it is transmitted to the District Court.

Factual and Procedural Background

The defendant, Pierre Joligard. filed a voluntary petition under chapter 7 of the Bankruptcy Code in this court on September 7, 1996. Christina Joligard, the debtor's former wife, then brought this adversary proceeding to determine the dischargeability of certain obligations the debtor was ordered by pay by a Virginia court in connection with child custody and support litigation involving their minor son, Mischa Joligard. On July 16, 1996, this court entered an order granting summary judgment in favor of Ms. Joligard and determining that $10,038.10 owed by the debtor to Ms.

Joligard was nondischargeable under § 523(a)(5), Bankruptcy Code, as being in the nature of child support.

The debtor filed a timely notice of appeal to the United States District Court for the Eastern District of Virginia on July 22, 1996. With the notice of appeal, he filed a designation of record on appeal as required by Fed.R.Bankr.P. 8006.[1] The designation broadly embraced "[a]ll pleadings, motions, answers, opinions, orders, and other filings made in this case," as well as a transcript of the June 18th 1996 hearing on the summary judgment motion.[2] He did not, however, furnish the clerk with any copies or make arrangements for copies to be made.[3] On July 31, 1996, the debtor filed with the clerk a set of exhibits entitled "Copies of Records for Record on Appeal," consisting of

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[1] "Within 10 days after filing the notice of appeal ..., the appellant shall file with the clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented. Within 10 days after the service of the appellant's statement the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal .... The record on appeal shall include the items so designated by the parties, the notice of appeal, the judgment, order, or decree appealed from, and any opinion, findings of fact, and conclusions of law of the court. Any party filing a designation of items to be included in the record shall provide to the clerk a copy of the items designated or, if the party fails to provide the copy, the clerk shall prepare the copy at the party's expense." The debtor has never filed a statement of issues on appeal. However, under Fed.R.Bankr.P. 8001. the failure to file the statement of issues on appeal "does not affect the validity of the appeal, but is ground only for such action as the district court ... deems appropriate, which may include dismissal of the appeal."

[2] The hearing was actually on *June* 18, 1996, but the court reporter incorrectly noted the hearing date on the transcript as *July* 18, 1996. That transcript has been prepared and has been filed with the clerk.

[3] Local Rule 410 ("Record on Appeal") provides:

> **(C) Copies of Record:** The party filing a designation of items to be included in the record on appeal shall file *with the designation* either:
>
> (1) a complete and correct copy of all items designated, or
>
> (2) a copy request torm with check payable to the Court's authorized outside copy service....

(emphasis added).

copies of six documents, five of which were not part of the record in this adversary proceeding but were apparently used in the state court litigation. On August 1, 1996, the debtor filed an additional pleading entitled "Supplementary Copies of Records for Record on Appeal" designating (and supplying copies of) six specific items, all of which were either formally part of the record in this adversary proceeding or were otherwise considered by the court. On August 14, 1996, Ms. Joligard, having apparently become aware that the debtor, despite having formally included in his original designation of record "all" pleadings in the adversary proceeding, had furnished the clerk only with certain items, filed a precautionary designation of record that included the pleadings omitted by the debtor.[4]

Discussion

Part VIII of the Federal Rules of Bankruptcy Procedure, governs appeals from judgments, orders or decrees of a bankruptcy judge to a district court or bankruptcy appellate panel.[5] Unfortunately, those rules do not contain an express counterpart to Federal Rule of Appellate Procedure lO(e), which provides a mechanism for a trial court to "settle" any controversy between the parties as to the contents of the record on appeal.[6] This issue was considered in *Berge v. Sweet (In the matter of Berge)*, 37

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[4] Ms. Joligard's letter to the clerk transmitting the designation stated that it was filed "[o]ut of an abundance of caution" in the event "the clerk does not interpret the appellant's designation to include the items on the attached list." No copies were furnished, but Ms. Joligard stated that she was prepared to supply copies to the extent that the items were not already part of the record on appeal. The debtor has not in fact furnished copies of any of the items, nor has the debtor made arrangements for their copying. Accordingly, the court will direct Ms. Joligard to furnish those copies.

[5] No bankruptcy appellate panel (see 28 U.S.C. § 158(b)) has been established for the Fourth Circuit. Therefore, all appeals from a judgment, order or decree of a bankruptcy judge in this circuit must be taken "to the district court for the judicial district in which the bankruptcy judge is serving." 28 U.S.C. § 158(a).

[6] **Rule 10. The Record on Appeal.**

(a) Composition of the Record on Appeal.—The record on appeal consists of the original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court.

B.R. 705 (Bankr. W.D. Wis. 1983), which concluded, after reviewing the authorities, that under the express language of Fed.R.Bankr.P. 8006 ("The record on appeal *shall* include the items so designated by the parties....") (emphasis added), that a bankruptcy court had no inherent power to modify the record on appeal to *exclude* items designated by a party, but that the bankruptcy court could properly direct that those designated items that were not formally part of the record in the adversary proceeding be transmitted to the district court in a separate packet.[7]

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[6] (...continued)

> (e) **Correction or Modification of the Record.** If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court either before or after the record is transmitted to the court of appeals, or the court of appeals. on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

[7] As the court noted in *Berge*, bankruptcy cases frequently involve a large number of more-or-less independent sub-controversies (contested matters and adversary proceedings). Although each of these sub-controversies creates its own record, the court, in ruling on the specific contested matter or adversary proceeding before it, is frequently aware of matters contained in the main case. Where such matters are formally relied upon (say, for example, the date the debtor's bankruptcy petition was filed in a preference avoidance proceeding), the better practice would be for the court to take judicial notice under Fed.R.Evid. 201. In practice, however, it is not uncommon for litigants in a contested matter or adversary proceeding to simply refer to matters in the main case as though they were part of the overall record. This reality is reflected in the *Berge* opinion:

> The record in an adversary proceeding in bankruptcy *presumes and in large measure relies upon*, the file in the underlying case. The record on appeal, for completeness and fair presentation of the issues to the appellate body, should therefore include those items from the record of the whole case which the parties agree upon.

37 B.R. at 708 (emphasis added).

This court will adopt the procedure suggested by *Berge*. The items included on the "Supplementary" designation filed August 1, 1996 were either formally part of the record in the adversary proceeding (items 1, 3, 4, 5, and 6) or were known to the court as part of the main case (item 2). Of the items filed as "Copies of Records for Record on Appeal" on July 31, 1996, only item 5 was part of the record in the adversary proceeding (having been attached as an exhibit to the debtor's affidavit in opposition to the motion for summary judgment). The remaining items[8] were neither part of the record in the adversary proceeding proper nor in the main case, nor were they offered to or considered by the court in ruling on the motion for summary judgment. Accordingly, these items will be segregated and transmitted to the District Court in a separate packet.

ORDER

For the foregoing reasons, it is

ORDERED:

1. The letter of Christina Joligard to the clerk dated August 6, 1996, which the court treats as a motion to exclude from the record on appeal certain items designated by the debtor, or, in the alternative, to segregate such items when they are transmitted to the District Court, is GRANTED in part and DENIED in part.

2. The clerk will transmit to the United States District Court, as part of the record on appeal, all items designated by the debtor as to which copies have been supplied or arrangements made for their copying pursuant to Local Rule 410(C), but shall segregate items numbered 1, 2, 3, 4, and 6 on the pleading entitled "Copies of Records for Record on Appeal" filed July 31, 1996.

3. Christina Joligard shall have ten days from the date of the entry of this order to furnish the clerk. or to make

[8] These consist of (1) Christina Joligard's responses to interrogatories in the state court action; (2) Fairfax Hospital medical records concerning Mischa Joligard; (3) a letter of Carolyn T. Hogans to Leslie A. Earll, M.D. dated January 19, 1995; (4) the debtor's income tax returns for 1994 and 1995; and (6) letters from P. M. Palumbo, Jr., M.D. and Yannick Cam dated June 11, 1996 and July 16, 1996, respectively.

appropriate arrangements with the clerk for copying, the items on the designation of record filed by her on August 14, 1996. If she fails to do so, the clerk shall promptly transmit the record on appeal to the United States District Court but shall in any event include, pursuant to Fed.R.Bankr.P. 8006—regardless of whether copies have been furnished by the parties—(a) the notice of appeal, (b) the memorandum opinion of July 16, 1996, (c) the order of July 16, 1996, granting summary judgment, and (d) a certified copy of the docket entries. The clerk shall also transmit to the District Court a copy of this order.

4. The clerk shall mail a copy of this memorandum opinion and order to theplaintiff and the defendant.

Date: /Aug 23, 1996
Alexandria, Virginia

s/Stephen S. Mitchel
Stephen S. Mitchell
United States Bankruptcy Judge

Copies to:

Ms. Christina Joligard
1407 Stocton Road
Meadowbrook, PA 19006
Plaintiff *pro se*

Mr. Pierre Joligard
6207 Williamsburg Blvd
Arlington, Va 22207
Defendant *pro se*

NOTICE OF JUDGMENT
OR ORDER
Entered On Docket 08/26/96

UNITED STATES BANKRUPTCY COURT
Eastern District of VA, Alexandria Division
206 N. Washington St., St 401
P.O. Box 19247
Alexandria, VA 22320-0247

In re:
JOLIGARD, PIERRE **Chapter 7**
6207 WILLIAMSBURG BLVD. **Case Number** 95-11838-SSM
ARLINGTON, VA 22207
SSN: 335-44-8669 EIN: NA
AKA JOLIGARD, GEORGES PIERRE

DISCHARGE OF THE DEBTOR

It appears that a petition commencing a case under title 11, United States Code, was filed by or against the person named above on May 2, 1995, that an order of relief was entered under chapter 7, and that no complaint objecting to the discharge of the debtor was filed within the time fixed by the court (or that a complaint objecting to discharge of the debtor was filed and, after due notice and hearing, was not sustained);

IT IS ORDERED that

1. The above-named debtor is released from all dischargeable debts.

2. Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of the personal liability of the debtor with respect to any of the following:

(a) debts dischargeable under 11 U.S.C. ß 523;

(b) unless heretofore or hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clauses (2), (4), (Û), and (15) of 11 U.S.C. ~ 523(a);

(c) debts determined by this court to be discharged.

3. All creditors whose debts are discharged by this order and all creditors whose judgments are declared null and void by paragraph 2 above are enjoined from instituting or continuing any action or employing any process or engaging in any act to collect such debts as personal liabilities of the abovenamed debtor.

Notice to Debtor(s) of Rights under 11 U.S.C. ß 524(d): You are under no obligation to reaffirm a debt. You may cancel any reaffirmation agreement within 60 days of the effective date. As to the effective date of any such agreement, consult your attorney. The court may subsequently disapprove any reaffirmation agreement pursuant to the standard of 11 U.S.C. ß 524(d). If you reaffirm a debt, do not timely rescind it and later default on the agreed payments, you will be legally liable for that debt.

FOR THE COURT, ROBERT M. WILY,
CLERK, DATED 08/19/95

(DIS-51)